Filed 3/21/19 In re K.L. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re K.L., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent; v. K.L., Defendant and Appellant.	E070302 (Super.Ct.No. RIJ1800027) OPINION

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni, Judge. Affirmed.

Brent D. Riggs, under appointment by the Court of Appeal, for Defendant and Appellant.

Gregory P. Priamos, County Counsel, James E. Brown, Guy B. Pittman, and Prabhath D. Shettigar, Deputy County Counsel, for Plaintiff and Respondent.

The juvenile court declared Ka. L. (child) a dependent and removed custody from K.L. (mother). The intervention occurred after instances where mother treated the child roughly, left the child unattended in a car seat on the living room floor of her mother's (maternal grandmother) house for approximately an hour. Mother seemed to have no idea how or when to feed or change or comfort the child, violently assaulted the maternal grandmother, and mother snatched the child away from her sister (maternal aunt) so roughly that the child's head snapped backwards. At the jurisdiction hearing, mother's counsel voiced mother's objection to jurisdiction, but did not object to the social worker's reports, on which the parties submitted and submitted on recommendations for the disposition.

On appeal, mother challenges the judgment because (a) the juvenile court failed to admonish the mother of her trial rights or elicit a waiver of those rights prior to mother's submission on the social worker's reports at the jurisdiction hearing; (b) there is insufficient evidence to support the alleged grounds for jurisdiction against mother; and (c) there was insufficient evidence that there was a substantial risk of harm to the child in mother's custody to warrant removal at the disposition hearing.[1] We affirm.

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[1] Mother filed a request for judicial notice of two items: (1) her companion habeas corpus petition in case No. E071078 and (2) the dictionary definition of "cephalohematoma." We previously granted judicial notice of item No. 1, and now deny the request for judicial notice of item No. 2, because the dictionary definition is a secondary authority properly cited in the briefs.

BACKGROUND

On January 9, 2018, the Riverside County Department of Public Social Services (DPSS) received a referral after the maternal grandmother of the child, less than one month old, who was assaulted by mother, after grandmother attempted to correct mother's rough manner of suctioning the child's nostrils. When maternal aunt picked up the child, who was crying after the rough placement by mother, to comfort the child, mother grabbed the child away from maternal aunt with sufficient force to cause the child's head to snap backwards. Mother then left the home.

The maternal grandmother reported there had been multiple incidents involving mother. The previous day, mother had taken the child with her as she ran errands in the rain. Upon returning to the grandmother's home, mother left the child unattended covered in wet blankets on the living room floor, and went outside to talk for an extended period of time with a man in his car.

A social worker responded to the referral, spoke with mother on January 10, 2018, and suggested the child be examined by a doctor. Mother admitted that she struck the maternal grandmother but denied throwing the child on the couch, although she did not recall that moment. Mother also admitted she abruptly grabbed the child out of maternal aunt's arms, causing the child's head to jerk back, and mother also acknowledged her irresponsible behavior on the previous day, leaving the child covered in wet blankets while she conversed with a friend in his car for approximately 40 minutes.

The medical examination of the child was unremarkable except that a CT scan showed evidence of calcified cephalohematoma, a calcified blood clot occurring as a birth injury (https://radiopaedia.org/articles/cephalohaematoma, as of Mar. 19, 2019), and irritation from a band-aid placed over the spot where the child was administered a vitamin K shot shortly after birth. The social worker observed that mother did not pay attention to the child, ignoring the cries and had to be prompted to feed the child. When mother breast fed the baby in the waiting area of the hospital she disrobed from the waist up making no attempt to cover herself causing discomfort for the social worker and other patients in the waiting area.

In talking with the social worker, mother was unable to state what kind of feeding, diaper changing, or sleeping schedule she followed with the child and demonstrated she did not know how to burp the child. Mother also acknowledged she had not bathed the child since birth, or even given the child a sponge bath, indicating she had been instructed not to bathe the child for two weeks by the hospital when the child was born. Mother also revealed she only wiped down spit up or cleaned the child's genitals during a diaper change. When asked why she had not bathed the child after he reached two weeks of age, mother indicated she did not have money for supplies. Mother stayed with the child, who was kept in the hospital overnight for tests, but she exhibited a lack of bonding with the child and seemed unconcerned for the child's discomfort as multiple attempts were required to draw blood; she did not attempt to soothe the child. The child was taken into protective custody on January 11, 2018.

Additional investigation revealed mother did not know who the father of the child was, although she suspected it was one of two men. Mother had a history of methamphetamine use, which she stopped using when she learned she was pregnant, but she had experimented with other drugs and alcohol, as well. Mother had a criminal history for prostitution for which she needed to "book and release" at jail due to a violation of probation relating to a conviction for prostitution and she had worked as a stripper at a topless nightclub prior to giving birth. She was currently unemployed and had no other source of income. She also had a history of mental illness, including two hospitalizations when she was a teenager.

DPSS filed a dependency petition pursuant to Welfare and Institutions Code,[2] section 300, subdivisions (b)(1) and (g). As amended, the allegations against mother related to her failure to supervise, protect, or provide necessaries for the child, her mental health issues, transient lifestyle, criminal history, and the incident of domestic violence involving the maternal grandmother. The allegations under section 300, subdivision (g), related to the inability to identify or locate the father of the baby.[3]

On March 9, 2018, the court conducted the adjudicatory hearing to establish jurisdiction. Mother's counsel did not object to the admission into evidence of the social

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[2] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[3] One of the men identified by mother as a possible father was eventually located and subjected to DNA testing, which eliminate him as a possible father. The other possible father had not been identified or located.

worker's reports and offered no affirmative evidence on mother's behalf, although counsel requested that mother's denials continue. Regarding disposition, mother's counsel informed the court that mother submitted on DPSS's recommendation. The court made true findings as to all the allegations and sustained the petition, finding the child comes within section 300, subdivisions (b)(1) and (g).[4] The court removed physical custody of the child from mother and ordered reunification services. Mother timely appealed.

DISCUSSION

1. *The Trial Court's Failure to Obtain a Written or Verbal Waiver of Mother's Trial Rights Was Not Reversible Error.*

Mother argues that her due process rights were violated at the jurisdiction hearing because trial counsel informed the court there was no objection to the admission of the social worker's reports in evidence and no affirmative evidence to present on behalf of mother. Mother also argues that the juvenile court erred in failing to advise her of her hearing rights and failed to elicit a waiver of rights before making its jurisdictional findings. While we agree the court should have admonished mother of her rights and obtained a written waiver thereof from mother, the social worker's reports were

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[4] The clerk's minutes indicate the court made a true finding under section 300, subdivision (b), only, but the reporter's transcript shows the court made findings under both subdivisions. "When there is a discrepancy between the reporter's transcript and the clerk's transcript, the reporter's transcript generally prevails as the official record of the proceedings." (*In re J.P.* (2014) 229 Cal.App.4th 108, 118, fn. 4, citing *Arlena M. v. Superior Court* (2004) 121 Cal.App.4th 566, 569–570.)

admissible whether or not counsel objected and they supported the court's findings so the omissions did not result in prejudice.

California Rules of Court, rule 5.534(g),[5] provides that the court must advise the child, parent, and guardian in section 300 cases of the following rights: (A) The right against self-incrimination; (B) the right to confront and cross-examine the persons who prepared reports or documents submitted to the court; (C) the right to use the process of the court to bring in witnesses; and (D) the right to present evidence to the court.

"If a parent denies the allegations in a section 300 petition, the juvenile court must hold a contested hearing on them." (*In re S.N.* (2016) 2 Cal.App.5th 665, 671; rule 5.684(a).) To this end, at the commencement of the jurisdiction hearing, rule 5.682(a), provides that after giving the advisement required by rule 5.534, the court must advise the parent or guardian of the right to a hearing by the court on the issues raised by the petition, and the right to have the child returned to the parent or guardian within two working days if the court finds the child does not come within the court's jurisdiction.

In addition, the court is required to "inquire whether the parent or guardian intends to admit or deny the allegations of the petition. If the parent or guardian neither admits nor denies the allegations, the court must state on the record that the parent or guardian does not admit the allegations. If the parent or guardian wishes to admit the allegations, the court must first find and state on the record that it is satisfied that the parent or

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5 All further rule references are to the California Rules of Court.

guardian understands the nature of the allegations and the direct consequences of the admission, and understands and waives the rights in (a) and (e)(3)." (Rule 5.682(b).)

Rule 5.682(d), provides that a parent or guardian may elect to admit the allegations of the petition or plead no contest, or elect to submit the jurisdictional determination to the court based on the information provided to the court. "If the parent or guardian submits to the jurisdictional determination in writing, *Waiver of Rights- - Juvenile Dependency* (form JV-190) must be completed by the parent or guardian and counsel and submitted to the court."

The court rule does not mandate the written waiver for a parent to submit on reports, but the better practice—the optimal practice—would be to obtain a written waiver whenever a contested hearing devolves into a de facto submission on reports, to insure the parent or guardian understands the significance of not presenting or offering affirmative evidence after agreeing that the social worker's reports may be admitted into evidence.

Rule 5.682(e)(3), sets out the required findings by the court where the parent or guardian wishes to admit the petition. If the parent or guardian wishes to admit the allegations, the court must find that the "parent or guardian has knowingly and intelligently waived the right to a trial on the issues by the court, the right to assert the privilege against self-incrimination, and the right to confront and to cross-examine adverse witnesses and to use the process of the court to compel the attendance of witnesses on the parent or guardian's behalf."

"Because the due process rights protected by these rules implicate a parent's fundamental right to care for and have custody of his or her child, it is error of constitutional dimension to accept a waiver of the right to a contested jurisdictional hearing based only on counsel's representations." (*In re S.N., supra,* 2 Cal.App.5th at p. 672, citing *In re Monique T.* (1992) 2 Cal.App.4th 1372, 1377.)

At the jurisdiction hearing, mother's counsel asked that her denials continue before indicating that she had no objection to the DPSS's evidence and that "We're offering no affirmative evidence." So saying, mother's counsel impliedly conveyed that mother would submit on the social worker's report, although technically mother neither admitted the petition, nor did she formally submit in the reports. In this situation, rule 5.684 contemplates a written waiver, but there were neither admonishments nor waivers given here.

We conclude the trial court glossed over the procedural protections failing to advise the mother of her hearing rights and failing to obtain waivers. We now turn to the question of prejudice. In this regard, the court in *In re Monique T.* established that in dependency actions, unlike criminal cases, the advisements in question are not constitutionally mandated, but, instead, are the product of California Rules of Court. (*In re Monique T., supra*, 2 Cal.App.4th at pp. 1377–1378.) "Nevertheless, a parent's fundamental right to care for and have custody of her child is implicated and may not be interfered with without due process of law." (*Id*. at p. 1377.) Thus, the failure to advise on the record is error but is subject to harmless error analysis. (*Id*. at p. 1378.)

Mother argues that the error was prejudicial because there is nothing in the record showing mother understood her rights. However, at the time of the detention hearing mother's counsel stated she had reviewed the advisements and waivers with mother. Pursuant to rule 5.534(g), those rights include the hearing rights to confront and cross-examine witnesses and present evidence. While not contemporaneous to the hearing, the earlier advisement suggests mother was made aware of her rights at some point in the proceedings. Nevertheless, even if we assume she did not understand her rights, reversal is not required unless the error is not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *In re S.N.*, *supra*, 2 Cal.App.5th at p. 672, citing *In re Monique T.*, *supra*, 2 Cal.App.4th at p. 1377.) That analysis requires us to determine if the error contributed to the verdict or judgment obtained. (*Chapman v. California*, *supra*, at p. 24.)

Mother suggests that the error is presumed to be prejudicial because the record does not show that trial counsel ever explained to mother her hearing rights and it is impossible to know if mother would have waived her right if properly advised, or whether she could have mounted a defense to the allegations. We disagree. The determination of whether the error was harmless or prejudicial does not depend on speculation whether mother could have come up with a defense at the time of the hearing; that would be speculation. Instead, we must examine the record before us to determine whether the error was harmless beyond a reasonable doubt. Thus, the reviewing court in *In re S.N.*, *supra*, 2 Cal.App.5th at page 672, concluded the error was harmless beyond a

reasonable doubt where evidence supporting the jurisdictional finding was overwhelming. Similarly, in *In re Monique T.*, the reviewing court found the evidence overwhelmingly supported the dependency order that the mother was unable to properly care for her daughter because of her mental and emotional disabilities and her drug abuse. (*In re Monique T., supra*, 2 Cal.App.4th at p. 1378.)

This requires us to turn to the question of the sufficiency of the evidence to determine if mother would have prevailed at the jurisdiction hearing absent the error.

2. *There is Sufficient Evidence to Support the Jurisdictional Grounds*.

Mother argues the error in failing to admonish mother or obtain a written waiver of rights from her was prejudicial because DPSS did not present substantial evidence to support the jurisdictional allegations. We disagree.

We review the true findings on the statutory bases for jurisdiction for substantial evidence. (*In re K.S.* (2016) 244 Cal.App.4th 327, 337, citing *In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) We must determine whether "'there is any substantial evidence, that is, evidence which is reasonable, credible, and of solid value'" to support jurisdiction. (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393) In doing so, we presume that the juvenile court's judgment is correct, and it is appellant's burden to affirmatively show error. (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.) Finally, all conflicts are resolved in favor of the judgment and all legitimate inferences are indulged in to uphold the juvenile court's determinations. (*In re Rocco M., supra*, at p. 820.)

Here, we cannot speculate about whether mother *might* have been able to present a defense because our review is limited to the record before us. On this record, there is ample evidence to support findings that mother neglected her child, failed to supervise or protect him, that she was homeless, without means to provide for her child, and had engaged in serious acts of violence against members of her family, placing her child in jeopardy by throwing the child on a couch. Mother admitted as much to the social worker, although she did not admit to "throwing" the child on the couch. She did admit to grabbing the child from the maternal aunt so roughly, as to cause the child's head to snap backwards.

Additionally, there is ample evidence to suggest that the risk to the child would continue in the future, where mother had no means to provide for the child, felt justified in striking the maternal grandmother, and felt it is proper to ignore the cries of a hungry child, with whom no signs of bonding were evident to observers. Given her admitted history of drug abuse, her stated intention of seeking reemployment as a stripper, and her lack of insight into her mental health issues, there was substantial evidence to support the court's determination that the child was a dependent of the court.[6]

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6 We do not need to address mother's challenge to the findings under section 300, subdivision (g), because those allegations pertain to the alleged father. Mother lacks standing to challenge findings affecting his rights. (*In re K.C.* (2011) 52 Cal.4th 231, 236.)

3. *Trial Counsel's Submission on the Recommendations at the Disposition Hearing Does Not Warrant Reversal as Ineffective Assistance of Counsel*.

Mother argues that counsel's act of submitting on the social worker's recommendation for the issues relating to the disposition constituted ineffective assistance of counsel. We disagree.

"To succeed on an ineffective assistance claim, a parent must show counsel's representation fell below an objective standard of reasonableness and the deficiency resulted in demonstrable prejudice." (*Kemper v. County of San Diego* (2015) 242 Cal.App.4th 1075, 1089, citing *In re Nada R.* (2001) 89 Cal.App.4th 1166, 1180; *In re O. S.* (2002) 102 Cal.App.4th 1402, 1407.) To establish prejudice, the parent must show a reasonable probability that the result of the proceeding would have been different, but for counsel's errors. (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 261.) We do not need to determine whether counsel's performance was deficient if the record demonstrates a lack of prejudice suffered, that is, that a different result would have occurred. (*Strickland v. Washington* (1984) 466 U.S. 668, 697 [104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 699]; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

In the present case, mother points to the fact that counsel submitted the dispositional issues on the social worker's recommendations, rather than on the reports, resulted in mother's unknowing forfeiture of appellate challenge to the disposition, citing *In re Richard K.* (1994) 25 Cal.App.4th 580, 589–590. While this may or may not give

rise to an appellate issue of ineffective assistance of counsel in an appropriate case, it is not so here.

There is nothing in the record to support an inference, much less a conclusion, that the child would not have been removed from mother's custody if counsel had submitted on the reports, as opposed to the social worker's recommendations. To the contrary, given mother's history of transience and mental health issues and her inability to provide adequate supervision and protection for her infant child, the court had little alternative to removal. The record shows mother had no stable residence or income to provide for her child, she had declined a shelter referral, and that a relative placement would not have been appropriate given the maternal grandmother's child welfare history and mother's objection to placement with the grandmother. In any event, mother informed the social worker that the child's placement with the nonrelative extended family member was "fantastic."

Because there was no alternative disposition feasible under the circumstances, mother has not shown that a different result would have occurred if counsel had merely submitted on the social worker's reports, as opposed to submitting on the recommendations. Mother has not established ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

RAPHAEL
J.